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No. 09-983

In the Supreme Court of the United States

KEVIN SCOTT PETERSON,
Petitioner,

v.

THE CITY OF FORT WORTH, TEXAS,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner resisted a lawful detention and was injured. He seeks to hold the City of Fort Worth liable for his injury pursuant to 42 U.S.C. § 1983 and *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978). The City requires all of its officers to complete a state-accredited 30-week long training academy in which the cadets learn, among other techniques, a knee strike. Petitioner is the first person known to the City ever to have suffered a femoral artery rupture as the result of a knee strike. The questions presented are:

Whether the court of appeals erred in finding that a 27-incident sampling of use of force complaints (all of which resulted in officer discipline, though only four instances of discipline were directly related to the alleged force) over a five-year period of time in the absence of any contextual evidence, such as the size of the department or the number of police-citizen encounters during the same time period, does not constitute evidence of a municipal policy of excessive force sufficient to avoid summary judgment.

Whether the same 27 complaints, given that none of them involved a knee strike rupturing an artery, constitute sufficient evidence of a constitutionally deficient training program.

Whether the City should be held liable under a theory of ratification simply because its *post hoc* internal affairs investigation, in which the City's policymaker did not participate, exonerated the officer in this particular, isolated instance.

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STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on November 17, 2009. The petition for a writ of certiorari was filed on February 16, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(i).

STATEMENT OF THE CASE

On August 13, 2005, Petitioner, Kevin Scott Peterson, and his wife, Jodi Peterson, attended a party at a restaurant in Fort Worth, Texas. The Petersons parked their truck in a private parking lot near the restaurant. Later, at approximately 10:00 p.m., the party moved to a nearby bar. While at the bar, Mr. Peterson drank six to eight beers. His wife drank three or four beers.

Approximately four hours after they arrived at the bar, the Petersons returned to the parking lot and, because they were intoxicated, decided to sleep in the truck rather than drive home. Pet. App. C. Later that morning, at approximately 5:00 a.m., a security guard, who was employed by the owner of the private parking lot, noticed the Petersons inside the vehicle. He knocked on the window and yelled in an attempt to wake them but was unsuccessful. He called the Fort Worth Police Department. Officers Horner and Ballard were dispatched to investigate. *Id.*

The officers approached the Petersons' truck and, in an effort to ensure that the Petersons' were alive and well, tried to wake them by yelling through the window. When they did not respond, Officer Horner opened the door and attempted to wake Mr. Peterson. Mr. Peterson was initially non-responsive, but soon

thereafter kicked at Officer Horner and ultimately struck her on her forearm with his fist. *See Id.* At that point Officer Ballard reached into the vehicle, grabbed Mr. Peterson by his belt and removed him from the vehicle. At some point Officer Ballard placed Peterson against the truck and handcuffed him. As the district court found, "Even when viewed in the light most favorable to Peterson, the evidence shows that Peterson was initially combative and resisted the officers' attempts to briefly detain and question him." Pet. App. UUU. From that point, the evidence is somewhat in dispute, but Peterson claims that while he was handcuffed Officer Ballard delivered a knee strike to his thigh, causing him pain. Pet. App. D.

After a brief investigation, the officers released Mr. Peterson. The Petersons eventually drove home. Kevin Peterson went to the hospital later that day and was diagnosed with a ruptured femoral artery, which he blames on the knee strike. For purposes of the proceedings below, the City agreed to assume that Officer Ballard did, in fact, deliver a knee strike to Peterson. Pet. App. L.

Approximately three months after the incident, Mr. Peterson filed a complaint with the Fort Worth Police Department. In it, Petitioner alleged that Officer Ballard executed a single knee strike, which led to his injury. The Internal Affairs Division initiated an investigation, interviewing the officers, the security guard, and the Petersons. The Police Department requested medical records from Mr. Peterson, but he did not respond to the request. Although Peterson's initial complaint was for excessive force, the Internal Affairs Division itself added two other allegations during the investigation, and

ultimately investigated the officers for three possible violations, including excessive force, falsifying a report, and conducting an illegal search.

During the investigation, Officer Ballard denied ever using a knee strike. Initially, Officer Horner stated that there was a knee strike. She later stated she never saw a knee strike, but assumed one was used because of the belligerent, combative conduct of Mr. Peterson. She stated that the comments she made during the investigation were based on her assumption that a knee strike had occurred.

It is the policy of the Fort Worth Police Department to send a completed internal affairs investigation to the supervisors within the subject officer's chain of command. Each supervisor has an opportunity to review the investigation and make recommendations as to whether he or she believes a violation of the department's General Orders occurred. If any supervisor believes a violation occurred, he or she will make a recommendation as to what discipline should be administered. After the chain-of-command review is completed, the investigation is sent to the Executive Deputy Chief for review and recommendations. If any supervisor has recommended a suspension or termination, the Chief of Police will review the investigation. If there is no such recommendation, the investigation ends with the decision of the Executive Deputy Chief. In this case, there was no recommendation of a suspension or termination, so the Chief of Police did not review the investigation or the comments of the supervisors in the officers' chain of command.

There was never a finding within the Fort Worth Police Department that Peterson was not a threat, that Officer Ballard lied about using the knee strike, that Ballard used excessive force, that Ballard failed to file a Use of Force report, or that Officer Horner falsified a report. The findings by the Police Department on the excessive force and falsifying a police report allegation was "not sustained," meaning that there was insufficient evidence to prove that misconduct took place. The finding on an illegal search was "unfounded," which meant that no misconduct occurred. The district court and a unanimous court of appeals panel also both found that Peterson's detention itself was not unlawful. Pet. App. RRR, J, Z.

Peterson brought the present action against the City of Fort Worth but did not sue the individual officers. Pet. App. Y. The district court granted the City's motion for summary judgment, finding there was no unlawful detention, no excessive force, and, that even if excessive force was used, there was no policy or custom of the City that caused the claimed injury. The court of appeals believed there was sufficient evidence that Officer Ballard used excessive force to prevent summary judgment on that basis, but affirmed, finding Petitioner had failed to produce evidence to impose liability on the City in light of "the standards required by *Monell* and its progeny." Pet. App. Y.

Petitioner is not challenging the lower courts' findings that the detention was lawful. He is claiming only that the City should be held liable for the harm caused by the knee strike. To try to find support for his position, Petitioner has engaged in broad discovery,

acquiring, among other things (as Petitioner explained it in his response to the City's motion for summary judgment), "boxes of internal affairs documents reflecting investigations of complaints of excessive force." Pet. App. EEEE. "After attempting to 'cull them down to a manageable amount of paper,' Peterson states that he 'was still faced with filing an approximately 900-page appendix.' But notwithstanding the numerous internal-affairs documents, Peterson has produced [only] twenty-seven investigations of [alleged] excessive force during the previous five years and 'out of the twenty-seven investigations, excessive force was sustained (found) on approximately four occasions.'" *Id.* (internal citations to Petitioner's brief omitted).

Petitioner presented these 27 claims of excessive force in an editorialized summary chart. *See* Pet. App. II. Of the 27 alleged incidents of prior uses of force submitted by Petitioner, the investigations resulted in findings of wrongdoing in each and every case. In four of the instances, the conclusion was that the officers had used excessive force. In one of those cases, the officer resigned, and in another, the officer was terminated. Other investigations resulted in responses ranging from counseling to official admonishments to suspensions. Petitioner's repeated claims that these 27 alleged instances of force were "clearly excessive" are his own self-serving conclusions. Interestingly, some of the *allegations* listed on Petitioner's summary chart appear to be minor, including claims such as "pulled hair," "they all fell to the ground," and "officer shoved him."

The City of Fort Worth requires each of its potential officers to complete its own 30-week long,

state-accredited, training academy prior to being allowed to work as a police officer. This is true even for officers who have prior law enforcement experience. Among other things, the cadets are trained in use-of-force and self-defense techniques. One of the techniques taught is a knee strike. The officers are also required to review and follow extensive written policies, General Orders, which, among other things, expressly forbid the use of unnecessary or excessive force. Petitioner is not claiming otherwise. Petitioner's own use of force expert, in fact, appears to have concluded that Officer Ballard's conduct violated the department's General Orders.

Other than the claims being made by Petitioner in this case, the City of Fort Worth knows of no other instance in its history in which a knee strike ruptured a person's artery or caused any remotely similar injury, and Petitioner has presented no evidence of any such prior occurrence.

ARGUMENT

On the relevant issue, municipal liability, the opinion below is correct, and there is no reason to review it. It does not conflict with any opinion of this Court or of any other court of appeals. And this case presents a poor vehicle for reviewing any of the numerous issues mentioned by Petitioner because he failed to present sufficient evidence in the district court to survive summary judgment. Of what was presented, much of Petitioner's evidence went only to the legality of the officers' initial interaction with him; yet that issue was resolved by the court of appeals in the City's favor (i.e., the detention was not unlawful), and Petitioner has not challenged that ruling. The

remaining evidence relates to the isolated act of a patrol officer and Petitioner's self-made, editorialized summary of 27 citizen complaints, alleging a variety of other wrongs over the span of some five years, all of which resulted in investigations and the discipline of officers, including retraining, reprimands, suspensions without pay, and termination.

Petitioner's "Pattern" Argument

Petitioner tries to turn an isolated act of a non-policymaker into a case of legal import by arguing that a conflict of authority exists where none does. More specifically, he tries to argue that instances of lower courts applying the same basic law to varying fact scenarios equate to varying opinions of law. The consistently-applied rule of law in issue is this: in some circumstances "*persistent and widespread*" practices within a city may be so "*permanent and well settled*"" as to constitute a municipal custom rising to the level of "policy" for purposes of § 1983 municipal liability. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690-91 (1978) (emphasis added). Although the Court in *Monell* expressly left some questions about the scope of municipal liability unanswered, it has since answered the only other question actually presented by this case. That is, can an isolated action of a non-policymaker standing alone create municipal liability under § 1983? "No," is of course the settled answer. *Oklahoma City v. Tuttle*, 471 U.S. 808, 831 (1985). Petitioner argues, however, that two pieces of summary judgment evidence--deposition testimony by the former chief of police and a self-made summary of 27 use of force complaints within the City—make this case something more. They do not.

Statements by the former police chief Mendoza

In his brief, Petitioner repeatedly references the deposition testimony of former police chief Mendoza, apparently arguing that the chief condoned his officers' uses of force following unlawful searches or seizures. *See* Pet. 5, 9, 12. The quoted statements, however, are presented out of context, are misleading, and, most significantly, are completely irrelevant to any issue presented by Petitioner.

In the last paragraph of his "Pattern" argument (Pet. 12), Petitioner states, "Additionally, there is confusion as to the weight to give to the opinions and statements of the policymaker, in this case, Chief Mendoza. Chief Mendoza stated a police officer may legally use force even if a police officer does not have a legal right to enter a private residence and make an arrest." Given the context of the paraphrased deposition examination, Chief Mendoza's actual testimony, although clearly a legal opinion, appears to have been correct.[1] Moreover, arguing that the chief

[1] The testimony Petitioner references was given during a lengthy, confusing examination, apparently designed to test the chief's memory regarding the exact facts of prior, unrelated cases, followed by hypothetical questions, apparently designed to test the chief's understanding of Fourth Amendment law as it applied to the hypothetical. For example, the series of such questions touched on by Petitioner in his petition related to one of the 27 force incidents. Police were called to investigate an alleged theft of cable television. The responding officers followed the actual cable up an apartment's staircase and into an unlocked apartment, where they found the apparent thief hiding under a trash bag in a closet. One of the hypothetical questions then posed by Petitioner's attorney was, "Okay. But if these officers, in

condoned such conduct is inaccurate. With regard to the prior use of force incident being discussed at the time, the chief had disciplined the officer, suspending him for three days without pay, because of the warrantless entry.

Regardless, *even if* Petitioner were able to charge the City with a policy of allowing force to be used following unlawful detentions, the issue is wholly irrelevant in this case. The Court of Appeals flatly held, "Peterson's detention was not unlawful." 588 F.3d at 846. Petitioner has not challenged that holding. Accordingly, the former chief's statements are inapposite to any issue before the Court and add nothing to Petitioner's argument that the Court should grant his petition.

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fact, created the situation that required them to use force, then they could not use force legally correct?" The chief responded, "Again, I tend to disagree with you. . . ." The Chief's legal opinion appears to have been correct. *See, e.g.*, *Dickerson v. McClellan*, 101 F.3d 1151, 1160-61 (6th Cir. 1996) (and cases cited therein) (applying "segmented analysis" in use of force case and noting that the relevant inquiry is "whether the force used to effect that seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances.") (quoting, *Carter v. Buscher*, 973 F.2d 1328, 1332-33 (7th Cir. 1992)); *accord Chappell v. City of Cleveland*, 585 F.3d 901, 906 (6th Cir. 2009) (in a case where a 15-year-old boy was shot in his own bedroom, the court, applying the segmented analysis, held, "Because it is the reasonableness of the 'seizure' that is the issue, not the reasonableness of the detectives' conduct in time segments leading up to the seizure, the district court properly held that any fact issues relating to the issuance of the warrant and initial entry into the Chappell residence are immaterial.")

The 27 Incidents

As Petitioner admits, he "did not provide information on the number of Use of Force reports filed or on each citizen complaint filed [during the applicable five-year time span]." Pet. 5, 7. Instead, he presented his own summarized characterizations of 27 *allegations* of excessive force made against Fort Worth police officers on dates ranging from May 25, 2001, to December 5, 2007. The lower courts correctly determined that this information, in a vacuum, is no evidence at all. 588 F.3d at 851-52. The court of appeals stated, "The failure of the evidence is that the plaintiffs have failed to provide context that would show a pattern of establishing municipal liability," *id.*, noting,

> Twenty-seven incidents in four years, with no context as to the overall number of arrests or any comparisons to other cities, is not sufficient evidence of a pattern rising to the level of a policy. The burden of providing a context that would show such a pattern falls on the plaintiff, not on the City, and Peterson has failed to meet that burden. No reasonable jury could conclude based on Peterson's evidence that the City had established a municipal policy of using or condoning excessive force.

588 F.3d at 851, n. 4. If it *were* to be considered in context, Petitioner's evidence would all but vanish.[2]

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[2] According to U.S. Census Bureau estimates for July 1, 2008, Fort Worth is the 17th largest city in the nation, with a population of 703,073 residents, making it larger in population than four

What is notable about the 27 incidents, however, is not the number "27," but rather the number "0." That is how many of the incidents involved a knee strike causing any, much less, a significant, unexpected injury to a suspect. In the only incident cited that did involve a knee strike, an officer was accused by a citizen witness of kneeing a suspect "in the groin, from behind." Petitioner presented no further evidence that the alleged knee strike to the suspect's rear caused any injury, much less one of the magnitude claimed by Petitioner.[3]

If a plaintiff could establish a municipal policy merely by sending a request for production to the city, seeking records of all past allegations of excessive force, and any resulting sampling of use of force allegations could then constitute a policy level

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different American states, Alaska (698,473), North Dakota (646,844), Vermont (621,760), and Wyoming (544,270), as well as the District of Columbia (599,657). *See* http://www.census.gov/popest/cities/tables/SUB-EST2008-01.csv and http://www.census.gov/popest/states/NST-ann-est.html. As the court of appeals noted, the Fort Worth Police Department employs more than 1500 officers. If each officer engaged in only one citizen encounter per day (surely a conservative estimate), over five years and 200 work days per year, the number of police-citizen encounters would be greater than 1.5 million. Petitioner has identified only 27 incidents of *alleged* excessive force over the same period, or in a percentage, no more than 0.0018% of police encounters result even in an allegation of excessive force according to the evidence presented by Petitioner.

[3] There was some discussion in the investigation about whether the knee strike contributed to the suspect hitting his face on the concrete ground upon which he was lying at the time of the struggle. There was no indication that the knee strike caused any injury to the part of the suspect's body to which it was applied.

"pattern," then no city in the country that takes investigating allegations of excessive force seriously could ever avail themselves of the limitations on municipal liability recognized by this Court in *Monell*. Perhaps a case will come along that requires closer scrutiny; perhaps here, for example, if there had been a history in the city of knee strikes inflicting serious or unintended harm, then the questions of how many, and how similar they must be in order to constitute a policy of inflicting excessive force, may have been appropriate inquiries. On the present record, however, there would be no point in entertaining such questions. The quantum and quality of the evidence in this record would not fuel a meaningful debate, and the obvious and only answer would be, "It takes more than this."

No conflict of authority exists between the circuits or between the court of appeals and the Supreme Court

In claiming a split of authority, Petitioner has cited six circuit court cases in addition to the underlying opinion in this case. The other circuits' cases, however, are not on point with the facts of this case or with each other and certainly cannot fairly be read to suggest that the other circuits would have treated the facts of this case any differently than did the court below. In short, there is no conflict.

The court of appeals in this case held that the 27 incidents produced by Petitioner did not constitute evidence of a municipal pattern or custom that was the driving force of the harm for which Petitioner complains. Pet. 8. The court stated that for purposes of examining potential municipal liability in a § 1983

case, a claimed pattern will equate to official policy only "when it is so common and well-settled as to constitute a custom that fairly represents municipal policy." 588 F.3d at 850 (citation omitted). Any such claim of a pattern must reflect some degree of "similarity and specificity," and the claimed pattern must consist of more than "isolated instances." *Id.* This explanation of § 1983 law by the court of appeals is wholly consistent with prior rulings by this Court. *See, e.g., Monell*, 436 U.S. at 691 (describing "customs and usages" as being "persistent and widespread" and "so permanent and well settled as to constitute a 'custom or usage' with the force of law."); *Tuttle*, 471 U.S. at 820-21 (single action by non-policymaker not sufficient); *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (explaining that "the Court has long recognized that a plaintiff may be able to prove the existence of a widespread practice that . . . is so permanent and well settled as to constitute a custom or usage with the force of law.")

Petitioner first cites *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991). Pet. 8. In *Larez*, the plaintiffs were subjected to an illegal, forced search of their home, during which they were roughed up, injured, threatened at gun point with having their heads blown off, and were left with a home in disarray with their belongings scattered and broken. One officer testified that he had witnessed "hundreds" of similar searches (regarding contents not being replaced). *Id.* at 634. The unit responsible for conducting the search was charged with investigating itself. *Id.* at 634-35. Plaintiff's expert had conducted a "comparative study," and, "armed with both many years of practical police experience and empirical data on police department procedures and operations

nationwide and in Los Angeles specifically," concluded that the department failed to properly investigate and discipline officers following citizen complaints. *Id.* at 635, 646. One of the plaintiffs' main complaints was that their home was left in severe disarray following the search. The chief testified that that was not improper conduct. The chief later made statements, which were admitted in trial, that the plaintiffs were lucky they were not more seriously injured. *Id.* at 636. Given the large quantity of unrefuted evidence, the court upheld the jury finding of municipal liability. *Id.* at 647. Citing *Pembaur v. Cincinnati*, 475 U.S. 469, 481 (1986), the court explained that it could find the city liable only if there was evidence from which the jury could have found that a "policy or custom" caused the plaintiff's harm. 946 F.2d at 646. Thus, it is not the law that is in conflict between *Larez* and this case; it is only the facts.

Nothing about the *Larez* holding could guide a court toward deciding the present case any differently than did the court below and nothing about its holding, therefore, could form the basis for a conflict of authority. In trying to argue otherwise, Petitioner is forced to characterize *Larez* quite differently than does even the Ninth Circuit itself. *See, e.g., Dillberg v. County of Kitsap*, 76 Fed. Appx. 792 (9th Cir. 2003) (unpublished) (noting that *Larez* involved multiple instances of known constitutional violations that went unredressed). As at least some indication that *Larez* is not on point as to the facts of this case and does not stand for the propositions Petitioner claims it does, see *MacMillan v. Roddenberry*, No. 5:08-cv-351-Oc-10GRJ, slip op., 2010 WL 668281 (M.D. Fla. Feb. 19, 2010). In *MacMillan*, a case with facts strikingly similar to those in this case, the district court found *Larez* to be

"readily distinguishable." *Id.* at *4. In *MacMillan*, the plaintiff complained of excessive force at the hands of deputies during his arrest. *Id.* at *1. As here, there was no dispute that the department had express policies prohibiting excessive force as well as policies related to internal investigations and discipline matters. *Id.* at *3. Accordingly, the plaintiff was left with the burden to provide evidence of "a widespread custom or practice of excessive force which the sheriff was aware of and permitted to go on." *Id.* at *3. "On this point," the court explained,

> MacMillan has submitted evidence of 15 citizen complaints of excessive force against the Sheriff's Office and Lake County Jail during the five years before and five years after MacMillan's arrest. These complaints . . . are simply not sufficient to establish a material issue of fact concerning a widespread custom or practice of excessive force. Indeed, standing alone, the complaints are meaningless and without any probative value. By the very nature of their activities, any law enforcement agency would be expected to receive some level of complaints from those who are arrested, and in the absence of (1) some statistical or other expert analysis of the number and type of complaints compared to the total number of arrests effected; and/or (2) some substantiation of a portion of the complaints by internal affairs or other comparable verification, the mere fact that some unsubstantiated complaints have been made is not notice of widespread abuses.

Id. The court also noted that of the 15 complaint allegations, "only one involved the use of a taser (the

only aspect of similarity the Court could find between MacMillan's arrest and these other complaints)," and held, "This minimal evidence is insufficient to show 'a widespread practice that . . . is so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.* (citing *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1308 (11th Cir. 2001)).

The result was the same in another remarkably similar case from the Ninth Circuit. *Hocking v. City of Roseville*, unreported, No. Civ. S-06-0316 RRB EFB, 2008 WL 1808250, (E.D. Cal. Apr. 22, 2008). Almost exactly as was done in this case, there, in response to the city's motion for summary judgment, "Plaintiffs presented a chart summarizing each and every citizen complaint alleged against Roseville police officers from January 2002 to November 2007 and the action taken on each complaint ostensibly for the purpose of demonstrating that City police officers engaged in a pattern of abuses for which the Police Chief was or should have been aware of and did nothing to remedy." *Id.* at *5. The district court, citing *Monell*, *Pembaur*, and *Canton v. Harris*, 489 U.S. 378 (1989), *id.* at *3-4, and easily distinguishing *Larez*, *id.* at *6, granted summary judgment. *Id.* at *5-7. Regarding the chart, the court held, "Statistics of unsustained complaints of excessive force and other police misconduct, without any evidence that those complaints had merit, does not suffice to establish municipal liability under § 1983." *Id.* at *5.

Petitioner next cites *Bielevicz v. Dubinon*, 915 F.2d 845 (3rd Cir. 1990). Pet. 9. This case also does not support Petitioner's claim of a circuit split of authority. Petitioner claims the case "addresses uncorrected use of force without reference to specificity or numerosity

. . . ." Pet. 9. The claim is simply not accurate. In *Bielevicz*, the former police chief admitted to a longstanding, well understood, deeply entrenched custom in Pittsburgh of officers using a made-up charge of public intoxication any time they wanted to in order to place anyone they wanted to behind bars. 915 F.2d at 849, 852. There was even an express "four-hour rule," which stated that persons held on such pretextual arrests must be released within four hours. *Id.* Such unjustified public intoxication arrests, pursuant to recognized department custom, were "often used to defuse crowd control problems, to detain people found in areas of notorious drug use, to arrest women suspected of prostitution, and to punish anyone who defiantly quarreled with an officer. In these situations, suspects were arrested and incarcerated, notwithstanding that typically there was not probable cause to believe they were intoxicated." *Id.* at 849. To make matters worse, the only internal investigative procedure in place expressly did not recognize complaints of illegal public intoxication arrests. *Id.*

The court cited *Monell* and ensuing Supreme Court cases in explaining that a municipal custom may rise to the level of a policy only when practices are "so permanent and well settled as to have the force of law." *Id.* at 850. In applying the correct law (the same law applied by the lower courts in this case), the *Bielevicz* court found that the former chief's testimony that the practice of making public intoxication arrests without probable cause (the exact same complaint made by the plaintiff) was so longstanding, widespread, and admittedly known and accepted by the former chief when he was the policymaker, that it

clearly constituted evidence of municipal policy the jury could have considered. *Id.*

Petitioner claims that the case does not reference the "specificity or numerosity" of the prior misconduct; yet the case is about little else but the years-long history within the police department of a rampant practice of the *exact* misconduct for which plaintiff had brought suit. *Bielevicz* has no relation to the facts of this case and does not support Petitioner's claim of a split of authority.[4]

Petitioner further cites *Barron v. Suffolk County Sheriff's Dept.*, 402 F.3d 225 (1st Cir. 2005), for the proposition that "one instance of conduct" is sufficient to establish a custom where there is "evidence from which to infer that it was a longstanding practice." If evidence of a longstanding practice is required, then Petitioner's claim that there is a conflict between the circuits fails. If his claim is that the case does not involve "previous occurrences or identical nature of infraction" (Pet. 10), the claim is simply wrong.

In *Barron*, a prison guard sued after enduring eleven months of continual harassment against him because he blew the whistle on another guard. Not only did he testify that there was a deeply entrenched code of silence within the prison guard ranks, the commander of the prison's day-to-day operations admitted the same thing and agreed that those who

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[4] Incidentally, the language from *Bielevicz* quoted by Petitioner (Pet. 9) does not come from the part of the opinion discussing what is required to establish a municipal policy or custom; it comes from the discussion of the additional necessary element (once a policy has been identified), causation. 915 F.2d at 851.

violate it could face "consequences." 402 F.3d at 237-38. Contrary to Petitioner's characterizations, the case involves many past instances of known conduct identical to that for which the plaintiff brought suit. The court also applied the very same law as is discussed above, noting that in order for a custom to be chargeable to the department, it must be "well settled and widespread." *Id.* at 236-37 (citing *Praprotnik*, 485 U.S. at 130 (plurality opinion)).

Petitioner claims that the Second Circuit's opinion in *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991) supports his position because, he asserts, there was "no requirement of identity of infractions or a specific number of instances." Pet. 10. That case, however, was about the admissibility of a lengthy report prepared by the Temporary Commission of Investigation of the State of New York following its investigation of the Suffolk County District Attorney's Office and Police Department. 926 F.2d at 146. The commission report detailed a history of systematic mismanagement, tolerance and prior ratification of misconduct, and failure to investigate and punish such conduct within the prosecutor's office. *Id.* at 146. The plaintiff claimed wrongful prosecution by the prosecutor, who was the soon-to-be father-in-law of the main police officer-witness's daughter. The plaintiff had gotten into a brawl with the officer one night when both were apparently drunk. As the dissenting justice in that case observed, "bizarre verdicts are the end product of bizarre trials. This case is no exception." *Id.* at 155. It does not appear from the opinion that the defendant County even argued that the report failed to identify a custom; it instead challenged the report's admissibility. The only *Monell*-related issue discussed by the court was causation. *Id.* at 152. The

case does not speak to the Second Circuit's view of any issue relevant to Petitioner's conflict claim.

In *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988), the next case cited by Petitioner, Judge Posner, writing on an issue he found had "little, probably no, practical significance," to the case before the court, 856 F.2d at 995, observed that the City, which had since abandoned the previously customary practice at issue, did "not challenge that it denied criminal defendants due process of law." *Id.* Noting that the acknowledged custom was "department-wide and of longstanding," the jury was allowed to attribute it to the city as policy. *Id.* at 996. The case does not conflict with the law of this Court or of any other circuit.

Finally, *Ware v. Jackson County, Mo.*, arose "out of the rampant sexual misconduct of employees . . . toward female inmates" at the Jackson County, Mississippi, Department of Corrections. 150 F.3d 873, 876 (8th Cir. 1998). Noting that "custom or usage" is demonstrated by: (1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct," and mindful of the "high standard" required to overturn a jury verdict, *id.* at 880, the court found the jury could have inferred a pattern chargeable to the county where an inmate of "limited mental capacity" was subjected to abuse, "which spanned five months and involved extortion, deception, and repeated sexual acts," culminating in her rape, where the record was "replete with evidence of repeated sexual misconduct on the part of JCDC personnel." *Id.* at 882. The court also refused to consider the County's challenge to the competency of the evidence because it was not adequately briefed. *Id.* The case does not reflect any circuit view of the law

that would have compelled a different outcome in Petitioner's case.

Given the foregoing, Petitioner's claim that these cases suggests he would have prevailed in any other circuit is unfounded. There is no split of authority and no reason to grant the petition.

Petitioner's "Failure to Train/Supervise" Argument

Petitioner has failed to present evidence that the City of Fort Worth's training or supervision was deficient or that the City consciously disregarded, or was deliberately indifferent concerning, any alleged deficiency. The bulk of Petitioner's "Failure to Train/Supervise" argument (Pet. 12-17) is simply a restatement of his "Pattern" argument. He argues, again relying on the same 27 self-summarized incidents, that the City had a pattern of failing to "train and/or supervise" its officers, regarding something. The exact contours of the argument are vague. Apparently Petitioner is arguing two things. First, Petitioner makes the allegation that the "officers were admittedly not taught [apparently in a general sense] the physical consequences of using force on citizens--the potential harm." Pet. 15. There is no such evidence to support this claim. To the contrary, Petitioner's own expert reports that the police department's General Orders advise that kicking and striking techniques pose a "probability of injury."

Petitioner's need to make such an argument arises from the reality that his only other, potentially more plausible, argument is not supported by any evidence, either. Petitioner's alternative assertion is that "there

was an obvious risk of injury from failing to train on appropriate use of knee strikes and/or the consequences of using a knee strike." Pet. 14. Petitioner did not come forth with even an allegation that officers are not trained in the use of knee strikes; they are. Plaintiff's implied argument is that he was seriously injured (suffering a femoral artery rupture) by a knee strike, and that if the officer had been trained better or differently, he would have known that the knee strike was likely to cause the injury and either not delivered it or delivered it in some other manner. But Petitioner presents not even a single example in the history of the Fort Worth Police Department (or in history, generally) where anyone has ever suffered a ruptured artery (or any remotely similar injury) as a result of a knee strike. There simply is no evidence that the City was in any way "put on notice that a new program [was] called for," or that it continued to adhere "to an approach that [it] kn[ew] or should [have] know[n] ha[d] failed to prevent tortious conduct by employees." *Board of County Com'rs of Bryan County v. Brown*, 520 U.S. 397, 407 (1997) (citing *Canton v. Harris*, 489 U.S. at 390 n. 10).

The only alleged prior knee strike Petitioner mentions involved a suspect resisting being handcuffed. Pet. 14. The officer allegedly kneed the suspect in the buttocks while trying to overcome the resistance. (While admitting that this suspect "tensed up" instead of simply following the officer's commands, Petitioner simultaneously characterizes that as "not resisting." *Id.*) Regardless of the circumstances leading up to its use, however, the knee strike in that single, prior incident did not cause a serious injury to the suspect legs, much less the type of injury alleged by Petitioner. The suspect did receive an injury, but

that injury came as a result of his face striking the concrete on which he was lying. Even if it were assumed that the knee strike caused the suspect to hit his face on the ground, nothing about that incident could possibly be said to have foretold of a future knee strike causing a femoral artery rupture.

No conflict of authority exists between the circuits or between the court of appeals and the Supreme Court

There is no conflict of authority between the Fifth Circuit and this Court or any other court of appeals on the issue of failure to train. Petitioner claims that the court below disregarded one manner of proving a failure to train claim. Pet. 13. It did not. Petitioner weaves a fairly complex tale of how the Fifth Circuit got it wrong, saying the court of appeals "combined the two prongs set out by this Court in *[Canton v. Harris]* and created a hybrid standard for a failure to train claim." Pet. 14. Petitioner supports this by claiming the court of appeals did something it did not do:

> Instead of analyzing whether Mr. Peterson had presented evidence that either there was a failure to train for situations that present an obvious potential for constitutional violation or a failure to train after learning of repeated violations, the court required both types of evidence that there was an obvious risk of injury from that specific conduct and a pattern of similar incidents causing injury.

Id. (emphasis in original). This assertion is the foundation of Petitioner's entire argument that there is a split of authority on this issue (*see* Pet. 13-17); yet

this assertion is not supported by the court of appeals' opinion.

In its opinion, the court of appeals plainly and unambiguously states, "[U]nder certain circumstances, § 1983 liability can attach for a single decision not to train an individual officer even where there has been no pattern of previous constitutional violations." 588 F.3d at 849 (quoting *Brown v. Bryan Co., Okla.*, 219 F.3d 450, 459 (5th Cir.2000)). In the quoted passage from the opinion in *Brown*, the Fifth Circuit is citing *Canton v. Harris* for the exact proposition Petitioner claims has been ignored. 219 F.3d at 459. The court does not misstate the law. It simply concludes that "Peterson has presented no material fact question to show that it should have been obvious to the policymakers that the risk of serious injury was a 'highly predictable consequence' of the failure to train." 588 F.3d at 849.[5]

There is no reason to analyze the cases from other circuits cited by Petitioner because, as explained above, Petitioner's basis to claim a conflict of authority is fatally flawed. That is, he incorrectly concludes, "[T]he Fifth Circuit finds that there *must be evidence that the violation had occurred previously*" (Pet. 16 (emphasis added)), while, again, what the court actually says is "§ 1983 liability can attach for a single decision not to train an individual officer *even where*

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[5] Petitioner's attempt to rely on an argument that, even in the absence of a pattern of prior incidents, the City should have foreseen the need for more or different training with regard to knee strikes is specious because Petitioner never once made that argument to the district court in response to the City's motion for summary judgment. *See* Pet. App. MMMM.

there has been no pattern of previous constitutional violations." 588 F.3d at 849 (emphasis added).

Accordingly, the court of appeals applied the correct law correctly, and the petition should be denied.

Petitioner's "Ratification" Argument

Citing *Praprotnik* and *Canton v. Harris*, Petitioner argues that the Court should grant his petition on the issue of ratification. Yet this case simply does not involve facts giving rise to a ratification claim. Under any arguable formulation of a ratification claim, as Petitioner acknowledges, a *policymaker* must approve a subordinate's unlawful conduct and the basis for it. Pet. 18, citing *Praprotnik*, 485 U.S. at 127 and *Bouman v. Block*, 940 F.2d 1211, 1231 (9th Cir.), cert. denied, 502 U.S. 1005 (1991). The same requirement is articulated in the opinion below. 588 F.3d at 848. Here, however, no *policymaker* ever approved (certainly not in any official sense) of the conduct alleged by Petitioner.

Petitioner *states* that he "has provided evidence of a policymaker that approved of the subordinate's conduct and the basis for it." Pet. 18. But in actuality, all Petitioner can point to is an internal affairs investigation that the policymaker, then-Chief Mendoza, did *not* review. This particular internal affairs investigation never rose any higher in the chain of command than the Deputy Chief. Accordingly, in this case in which the parties agree that Chief Mendoza was the only relevant policymaker (Pet. 3, 4), the Deputy Chief who made the decision to approve the officer's chain of command's recommended finding that no excessive force violation had occurred could not

have ratified the subordinate officer's conduct in any manner that would give rise to municipal liability.

Despite this, Petitioner claims, "In this case there was an investigation disclosing . . . that the entire chain of command condoned the conduct and that the policymaker himself found that both officers followed the city's policies and procedures." Pet. 20. Although this statement at first appears difficult to reconcile with the facts discussed above (i.e., the Chief was not involved in the investigation or its review), Petitioner, through the use of carefully-chosen words, is not being entirely untruthful. What Petitioner actually appears to be claiming is that the Chief allegedly "ratified" the officer's conduct *through his deposition testimony in this lawsuit*. Petitioner has directed the Court to no authority that holds a municipality may be found liable under § 1983 because its policymaker disagreed under deposition examination that a subordinate's conduct was unconstitutional. Such evidence cannot possibly satisfy Petitioner's burden to demonstrate that deliberate conduct by the City was the 'moving force' behind the alleged injury when the alleged injury had occurred years earlier. *See Board of County Com'rs of Bryan County v. Brown*, 520 U.S. 397, 404 (1997).

Even if the Chief had reviewed the internal affairs investigation, the result would be no different. Petitioner points to the Sixth and Ninth Circuits in support of his claim that there is a conflict of authority. At best, there is a conflict of semantics, but when courts are faced with facts similar to this case, the results are the same in those circuits as it was in the court below. *See* (from the 6th Circuit): *Swann v. City of Columbus*, unreported, No. 2:04-cv-578, 2007

WL 1831131 (S.D. Ohio June 25, 2007). There the plaintiff claimed that during his arrest he was unnecessarily punched, kicked, and smothered unconscious. He further claimed that following the incident, the officers had submitted fraudulent reports. Because the officers were not disciplined he claimed that the City of Columbus had ratified the officers' conduct. The court easily dispensed with the claim, noting, "[S]ubsequent ratification of past wrongdoing cannot logically be the moving force behind the alleged constitutional violation." *Id.* at *3 (citing *Tompkins v. Frost*, 655 F. Supp. 468, 472 (E.D. Mich. 1987) for its holding that "wrongful conduct after an injury cannot be the proximate cause of the same injury").

Likewise, in *Tomazic v. City of Cleveland*, unreported, No. 1:04cv2252, 2006 WL 2661295 (N.D. Ohio Sept. 14, 2006), an officer shot and killed a fleeing misdemeanant. Because the officer was not disciplined by the department, the plaintiff claimed the City of Cleveland should be held liable on a theory of ratification. The court disagreed, holding, "Ratification of Officer Jopek's acts after the fact, even if it had happened, could not have been a direct cause of the shooting when it occurred. Absent some showing that the City had a past history of ratifying the use of deadly force in situations similar to that which occurred in this case, and that Officer Jopek relied on this policy when making his decision to shoot Mr. Strnad, there cannot be the necessary causal link to establish the City's liability." *Id.* at *5.

From the Ninth Circuit, the court in *Haugen v. Brosseau*, 351 F.3d 372 (9th Cir. 2003), rev'd on other ground, 543 U.S. 194 (2004), acknowledged the existence of ratification as a potential basis for

municipal liability but held that "there are no facts in the record that suggest that the single failure to discipline Haugen rises to the level of such a ratification." *Id.* at 393 (citing *Santiago v. Fenton*, 891 F.2d 373, 382 (1st Cir. 1989) for its refusal to hold that the "failure of a police department to discipline in a specific instance is an adequate basis for municipal liability under Monell") *See also Peschel v. City of Missoula*, 686 F. Supp. 2d 1092, 1102 (D. Mont. 2009) (explaining Ninth Circuit law regarding ratification and emphasizing its limits, noting, "Importantly, the circumstances of the ratification must also demonstrate that the supervisor had previously set in motion acts of others which caused the others to inflict a constitutional injury.").

Finally, *Siwiec v. Thompson*, unreported, No. CV-02-454-ST, CV 02-460-ST, 2004 WL 2480516 (D. Or. Nov. 3, 2004), was a case factually very similar to this one in that the plaintiff attempted to hold the offending officer's employer liable because an investigation had allegedly "ratified" the officer's unconstitutional conduct. Although without using the exact words Petitioner highlights, "extreme factual situations," after reviewing ratification law, the court did observe, "Cases recognizing post-event ratification have generally presented very clear instances of abuse and gross recklessness." *Id.* at *22. Then, applying Ninth Circuit law, the court held, "[the plaintiff] has shown that [Sheriff] Spinden concurred in the decision of an Internal Affairs Investigation team regarding a series of complaints regarding a single police/citizen encounter. That is insufficient to proceed against Washington County on a ratification theory." *Id.* at *24.

Accordingly, had Petitioner's case arisen in the Sixth or Ninth circuits, the result would have been the same as it was here. In fact, the one-time, *post hoc*, approval of the isolated act of Office Ballard would not have given rise to municipal liability in any court, as it could not have caused the harm for which Petitioner complains. For these reasons, Petitioner has failed to present sufficient evidence to support a ratification claim or to demonstrate any conflict of authority, and the petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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